

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KENNETH HATLEN.

Plaintiff,

Case No. 3:12-cv-00534-MMD-WGC

v.

GREG COX, et al.,

Defendants.

ORDER

This Order addresses the majority of the motions, reports and recommendations, and objections pending before the Court.

I. Dkt. no. 135: MOTION FOR RECONSIDERATION

A. Introduction

Pursuant to 28 U.S.C. § 1915A, the Court screened Plaintiff's amended complaint on January 25, 2013. (Dkt. no. 44.) The Screening Order stayed this case for ninety (90) days to allow the parties to participate in mediation. Plaintiff filed a number of motions, including a motion to reconsider (dkt. no. 56), during the ninety (90) day stay. These motions were denied without prejudice. (Dkt. no. 57.) At a hearing held on December 3, 2013, Plaintiff explained that he thought he had re-filed his motion to reconsider regarding the Screening Order after the ninety (90) day stay expired. The Court granted Plaintiff leave to re-file his motion to reconsider, which was re-filed as dkt. no. 135. (Dkt. no. 133).

B. Legal Standard

2 Plaintiff's motion for reconsideration asks the Court to reconsider its decision to
3 dismiss certain claims and defendants, and to deny Plaintiff's motion for appointment of
4 counsel.¹ A motion to reconsider must set forth "some valid reason why the court should
5 reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to
6 persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F. Supp.
7 2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is
8 presented with newly discovered evidence, (2) committed clear error or the initial
9 decision was manifestly unjust, or (3) if there is an intervening change in controlling law."
10 *Sch. Dist. No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). On the other hand,
11 "[a] motion for reconsideration is not an avenue to re-litigate the same issues and
12 arguments upon which the court already has ruled." *Brown v. Kinross Gold, U.S.A.*, 378
13 F. Supp. 2d 1280, 1288 (D. Nev. 2005). A motion for reconsideration is properly denied
14 when the movant fails to establish any reason justifying relief. *Backlund v. Barnhart*, 778
15 F.2d 1386, 1388 (9th Cir. 1985) (holding that a district court properly denied a motion for
16 reconsideration in which the plaintiff presented no arguments that were not already
17 raised in his original motion).

C. Dismissal of Certain Claims and Defendants

19 In his amended complaint, Plaintiff alleges twenty-two (22) counts against sixty-
20 five (65) prison staff members at Ely State Prison (“ESP”) and Northern Nevada
21 Correctional Center (“NNCC”). (Dkt. no. 22.) The Court allowed Plaintiff to proceed fully
22 on sixteen (16) counts and to proceed in part on counts 3, 10, and 22. (Dkt. no. 44 at
23 21.) The Court dismissed with prejudice the following five (5) counts: 11, 12, 14, 17, and

25 Plaintiff's motion states that he identifies some "errors and discrepancies" in the
26 Screening Order. However, not all errors justify reconsideration. For example, Plaintiff
27 claims that the Screening Order states that his "back" had been re-injured when it was
28 his "jaw" that was re-injured. (Dkt. no. 135 at 1.) Plaintiff also requests that certain
names be corrected but does not offer any information to show there was error in the
Court's Screening Order.

1 20. (*Id.*) The Court dismissed claims against eight (8) defendants, including Sergeant
 2 Sabaskey, because the allegations against them are made in connection with dismissed
 3 claims, or because Plaintiff made no allegations against them in the amended complaint.
 4 (*Id.* at 20-21.)

5 Plaintiff argues that Sabaskey should not have been dismissed because his name
 6 appears on an emergency grievance and because Plaintiff's allegations in support of
 7 Count I are the same allegations raised in his initial complaint, where the Court permitted
 8 Sabaskey to be sued. (Dkt. no. 135 at 1.) The amended complaint alleges that "the sgt
 9 responded to an emergency grievance and ordered that [Plaintiff] be moved,
 10 Correctional Officer Rose didn't move me, left me in same cell." (Dkt. no. 22 at 6.) The
 11 emergency grievance form attached to the amended complaint had a circle over
 12 Sabaskey's signature, identifying Sabaskey as the sergeant who ordered Plaintiff to be
 13 moved to a different cell, but then failed to ensure the move was carried out. (Dkt. no. 7
 14 at 4.) Plaintiff has offered a reason justifying reconsideration of the Screening Order. The
 15 Court agrees that Plaintiff has stated a claim in Count I against Sabaskey.

16 Next, Plaintiff argues that the Court erred in dismissing claims premised on
 17 interference with the grievance process.² The gist of Plaintiff's argument is that because
 18 he is required to exhaust his administrative remedies before pursuing legal actions,
 19 prison staff's obstructive conduct impeded his constitutional right to access the courts.³
 20 (Dkt. no. 135 at 3.) However, "there is no legitimate claim of entitlement to a grievance
 21 procedure." *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988); see *Olim v. Wakinekona*,
 22 461 U.S. 238, 249 (1983) (prison regulations that "place no substantive limitations on
 23 official discretion" do not create a liberty interest entitled to due process protection).

25 ²Plaintiff identifies counts 10, 11, 12, 14, 17, 20, and 22. (Dkt. no. 135 at 3-9.)

26 ³Plaintiff's allegations regarding interference with the grievance process include
 27 stealing Plaintiff's grievance documents (as alleged in count 10), improperly rejecting
 28 and failing to take action on his grievance (as alleged in count 11), returning grievances
 and refusing to provide Plaintiff with grievances (as alleged in count 12), and stealing
 Plaintiff's disciplinary appeal (as alleged in count 20). (Dkt. no. 22.)

1 Thus, because Plaintiff does not have a separate constitutional right for his grievance to
 2 be processed in a certain way, the alleged interferences with Plaintiff's pursuit of his
 3 grievances cannot serve as a basis for liability under § 1983 as pleaded in this action.⁴

4 If the prison conditions that Plaintiff seeks to grieve give rise to a constitutional
 5 claim, then Plaintiff may bring a § 1983 action even if prison staff obstructed his
 6 grievance. This is because the Prison Litigation Reform Act ("PLRA") requires an inmate
 7 like Plaintiff to either exhaust his available administrative remedies; or, if remedies are
 8 not available, an inmate does not need to exhaust them. *Albino v. Baca*, 747 F.3d 1162,
 9 1171 (9th Cir. 2014) (en banc) ("The PLRA mandates that inmates exhaust all available
 10 administrative remedies before filing 'any suit challenging prison conditions,' including,
 11 but not limited to, suits under § 1983. An inmate is required to exhaust only *available*
 12 remedies." (citation omitted)). In other words, Plaintiff must either (1) exhaust his
 13 administrative remedies before bringing claims that prison conditions violate his
 14 constitutional rights or (2) bring those claims if he can demonstrate that administrative
 15 remedies were not available to him. Examples of unavailable remedies include remedies
 16 that are screened by staff "for reasons inconsistent with or unsupported by applicable
 17 regulations," *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010), and situations where
 18 remedies were "ineffective, unobtainable, unduly prolonged, inadequate, or obviously
 19 futile." *Albino*, 747 F.3d at 1172 (citation and internal quotation marks omitted). If
 20 Plaintiff's grievances identify issues that raise constitutional violations, and if Plaintiff can
 21 show that alleged staff obstruction made the grievance process unavailable, then
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24 ⁴The Court notes that inmates have constitutional rights related to the grievance
 25 process. For example, inmates have a well-established "First Amendment right to file
 26 prison grievances," and retaliation for exercising that right "is itself a constitutional
 27 violation." *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). Plaintiff, however, does
 28 not allege that Defendants' obstructive conduct affects his constitutional rights; rather, he
 takes issue with the grievance process itself. In fact, the amended complaint does not
 elaborate on the substance of these grievances, or suggest that the reason for the
 obstructive behavior is constitutionally problematic. Without such allegations, Plaintiff
 cannot state a colorable § 1983 claim.

1 Plaintiff would not be foreclosed from accessing the courts. In that event, Plaintiff may
2 elect to file a new lawsuit to allege these claims.

3 Plaintiff further argues that the documents referenced in count 20 were not
4 returned. (Dkt. no. 135 at 8.) He claims that the amended complaint alleges that “misc.”
5 documents were found/returned, approx 5% of them, 95% stolen.” (*Id.*) The amended
6 complaint, however, does not support Plaintiff’s allegation. The amended complaint
7 alleges that “misc legal documents” were found and “they are returned.” (Dkt. no. 22 at
8 48.) The Screening Order was based on allegations in the amended complaint and
9 Plaintiff has not demonstrated that the Court made clear error in dismissing count 20.

10 Finally, Plaintiff contends that the Court made a mistake in reading his
11 handwritten amended complaint with respect to the following defendants’ names:
12 caseworker Meares is erroneously identified as Means and Dr. Marr is erroneously
13 identified as Dr. Mar. (Dkt. no. 135 at 2-3.) These defendants’ names are correctly
14 identified in the case caption and other filings. Plaintiff also requests that the Court
15 change the name of Dr. King to Dr. Koehn. (*Id.* at 2.) The correction to this defendant’s
16 name has since been made. (Dkt. nos. 72 & 144.)

17 **D. Request for Appointment of Counsel**

18 The Court declines to reconsider its decision to deny Plaintiff’s request for
19 appointment of counsel. There is no constitutional right to appointed counsel in a § 1983
20 action. *E.g., Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *opinion reinstated in*
21 *pertinent part*, 154 F.3d 952, 954 n.1 (9th Cir. 1998) (en banc). The provision in 28
22 U.S.C. § 1915(e)(1), however, gives a district court the discretion to request that an
23 attorney represent an indigent civil litigant. 28 U.S.C. § 1915(e)(1) (“The court may
24 request an attorney to represent any person unable to afford counsel.”); see, e.g.,
25 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Yet, the statute does not
26 give the court the authority to compel an attorney to accept appointment, such that
27 counsel remains free to decline the request. See *Mallard v. U.S. Dist. Court for S. Dist.*
28 *of Iowa*, 490 U.S. 296, 310 (1989). Furthermore, while the decision to request counsel

1 lies within the discretion of the district court, the court may exercise this discretion to
2 request counsel only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d
3 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an
4 evaluation of both the likelihood of success on the merits and [the plaintiff’s ability to]
5 articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.*
6 (quoting *Wilborn*, 789 F.2d at 1331) (internal quotation marks omitted).

7 The Court finds that no exceptional circumstances warrant requesting a private
8 attorney to voluntarily represent Plaintiff in this matter. Again, the claims and issues are
9 not overly complex. Plaintiff has been able to articulate his claims, as evidenced by the
10 amended complaint and his filings in this case. Although Plaintiff states in his many
11 filings that he does not understand the Court’s rulings, the Court finds that Plaintiff is
12 able to explain his objections. The challenge presented here is not Plaintiff’s ability to
13 articulate his claims; it is Plaintiff’s apparent refusal to comply with the Court’s order to
14 refrain from filing motions raising issues unrelated to the claims and defendants in this
15 case. This is not a valid reason for appointment of counsel. Plaintiff’s request for
16 appointment of counsel is therefore denied.

17 **E. Conclusion**

18 It is ordered that Plaintiff’s motion for reconsideration (dkt. no. 135) is granted in
19 part and denied in part. Plaintiff’s motion is granted with respect to his allegations
20 against Sabaskey. Plaintiff may proceed against defendant Sabaskey in count 1.
21 Plaintiff’s motion is denied in all other respects.

22 The Clerk is ordered to vacate the part of the Screening Order relating to
23 dismissal of Sabaskey.

24 The Attorney General shall advise the court within twenty-one (21) days from the
25 date that this order is entered whether service of process for Sabasey is accepted. If the
26 Attorney General accepts service of process, Sabaskey shall file and serve an answer or
27 other response to the complaint within thirty (30) days of the date of the notice of
28 acceptance of service. If service cannot be accepted, then plaintiff will need to file a

1 motion identifying the unserved defendant, requesting the issuance of a summons, and
2 specifying a full name and address for said defendant. Pursuant to Rule 4(m) of the
3 Federal Rules of Civil Procedure, service must be accomplished within one hundred
4 twenty (120) days from the date of this order.

5 **II. Dkt. no. 184: MOTION FOR APPOINTMENT OF COUNSEL**

6 Plaintiff's separately filed motion for appointment of counsel (dkt. no. 184) is
7 denied for the reasons discussed above.

8 **III. Dkt. nos. 143, 175, & 294: OBJECTIONS TO DEFENDANTS' REQUESTS FOR
9 EXTENSION**

10 Plaintiff has filed three separate objections to the Magistrate Judge's decision to
11 grant Defendants' requests for extension of time. (Dkt. nos. 143, 175, & 294.) Plaintiff
12 objects to the granting of Defendants' first request for a forty-five day extension of the
13 dispositive motion deadline (dkt. no. 138), contending that this Court had already ruled
14 on Defendants' extension request during the December 3, 2013, hearing.⁵ (Dkt. no. 43.)
15 In his objection to the Magistrate Judge's decision to grant Defendants' second request
16 to extend the same deadline by an additional ten (10) days (dkt. no. 175), Plaintiff
17 argues that granting the extension gave Defendants favorable treatment. (Dkt. no. 175.)
18 In his more recent objection (dkt no. 294), Plaintiff challenges the Magistrate Judge's
19 decision to grant extension requests without giving him the opportunity to respond.

20 The Court disagrees. First and foremost, Defendants did not request an extension
21 of the dispositive motion deadline and the Court did not address that deadline during the
22 December 3, 2013, hearing. The Court did address the need to amend certain deadlines
23 in the event Plaintiff's motion for reconsideration — which the Court allowed Plaintiff to
24 re-file — was granted. Second, the Court has inherent authority to control its docket.
25 There is nothing unusual about the Court granting or denying extension requests without
26 waiting for a response, particularly where, as here, Defendants have demonstrated good

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28 ⁵Plaintiff incorrectly states that the hearing was held on December 2, 2013.

1 cause to support their requests. Plaintiff's objections (dkt. nos. 143, 175, & 294) are
2 overruled.

3 **IV. Dkt. no. 152: MOTION FOR HEARING AND/OR SUSPEND ANY/ALL RULINGS
4 BY MAGISTRATE JUDGE**

5 As the Court noted in its Order entered on December 17, 2013, the proper
6 procedure for raising any complaints of any judicial misconduct is to file a complaint with
7 the Ninth Circuit Clerk. (Dkt. no. 147.) The Court refers Plaintiff to the complaint form and
8 Guidelines for Judicial Misconduct or Disability Complaints previously attached to the
9 Court's Order. (*Id.*) Plaintiff's motion (dkt. no. 152) is denied.

10 **V. Dkt. no. 180: OBJECTION TO MAGISTRATE JUDGE'S RULINGS**

11 Plaintiff contends he objects to the Magistrate Judge's rulings made during a
12 telephone hearing on January 28, 2014. (Dkt. no. 180.) Plaintiff included a list of issues
13 that he requested this Court to address in a telephone hearing. But Plaintiff's objection
14 does not adequately inform the Court of the Magistrate Judge's ruling to which he
15 objects and the basis for his objection. Moreover, Plaintiff has raised issues identified in
16 this objection in other filings that the Court has either addressed or will be addressing in
17 this Order. Plaintiff's objection (dkt. no. 180) is overruled.

18 **VI. Dkt. No. 198: OBJECTION TO ORDER (Dkt. No. 189)**

19 Plaintiff objects to the Magistrate Judge's Order denying his motion for emergency
20 relief. (Dkt. no. 198.) In his objection, Plaintiff claims he does not understand how to
21 respond to the Magistrate Judge's Order because the Order is "way too complex and
22 difficult." (*Id.* at 1.) Plaintiff goes on to argue, in part, why his allegations are related to
23 this case and why the Magistrate Judge should have addressed them. The Court has
24 reviewed Plaintiff's emergency motion, the Magistrate Judge's Order, and Plaintiff's
25 objection. The Court agrees with the Magistrate Judge. Plaintiff's objection (dkt. no. 198)
26 is overruled.

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VII. Dkt. nos. 207, 255, 259, 262, 264, 312, 331, & 332: REPORT AND RECOMMENDATION (“R&R”)

The Court will next address the Magistrate Judge's recommendations relating to nine (9) motions for injunctive relief.

In the R&R entered on February 28, 2014, the Magistrate Judge recommended that Plaintiff's emergency motion for injunctive relief (dkt. no. 97) and motion for a discussion and hearing (dkt. no. 98) be denied.⁶ (Dkt. no. 207.) The Magistrate Judge found that Plaintiff has continued to raise issues that are not part of the claims in this case in his motions for injunctive relief. In his objection, Plaintiff argues that he can demonstrate a likelihood of success on the merits and list the irreparable harm he has suffered. (Dkt. no. 214.) However, Plaintiff ignores the basis of the Magistrate Judge's ruling — the issues raised in Plaintiff's two motions (dkt. nos. 97 & 98) are not related to the claims in this case. While Plaintiff may have sustained harm, his recourse is to exhaust his administrative remedies and then to file a new lawsuit if necessary, or, if those remedies are not available, to file a new lawsuit. This point has been relayed to Plaintiff multiple times. It appears to the Court that Plaintiff simply disagrees with the Court's rulings and continues to raise these unrelated issues. After a careful review of Plaintiff's motions, the Court agrees with, and therefore adopts, the Magistrate Judge's recommendations regarding dkt. nos. 97 and 98.

In the following R&Rs, the Magistrate Judge recommended that the Court deny Plaintiff's motions for injunctive relief because they raise issues unrelated to the claims in this case: dkt. nos. 255, 259, 262 & 264. The Court has reviewed these R&Rs, Plaintiff's motions (dkt. nos. 231, 227, 237 & 256), and Plaintiff's objections (dkt. nos. 268 & 282). The Court agrees with the Magistrate Judge's recommendations.

⁶The latter motion (dkt. no. 98) identifies defendants' alleged conduct, including theft of Plaintiff's legal documents, damages to Plaintiff's legal boxes, and interference with the grievance process, and requests the Court to hold Defendants criminally liable. The Magistrate Judge construes this motion as seeking injunctive relief.

1 Furthermore, in the R&R issued on June 26, 2014, the Magistrate Judge
 2 recommended denial of Plaintiff's emergency motion (dkt. no. 311) because the issues
 3 Plaintiff raised are not part of the claims in this lawsuit. (Dkt. no. 312.) In his objection,
 4 Plaintiff argues that if Defendants were allowed to harm him mortally, Plaintiff would not
 5 be able to prosecute this action. (Dkt. no. 324.) Plaintiff's filings have not substantiated
 6 his claim of such harm. Moreover, Plaintiff cannot rely on such allegations to expand the
 7 scope of this action beyond the counts that survived screening. The Court has
 8 jurisdiction only to consider claims that Plaintiff is allowed to pursue, not claims that may
 9 arise after he initiated this action.

10 Finally, on June 30, 2014, the Magistrate Judge issued two R&Rs regarding
 11 Plaintiff's two other motions for injunctive relief. (Dkt. nos. 331 & 332.) In both R&Rs, the
 12 Magistrate Judge recommends that the Court deny Plaintiff's motions requesting a
 13 hearing and for injunctive relief (dkt. nos. 290 & 326) because the motions raise issues
 14 unrelated to the claims in this case.⁷ (Dkt. nos. 331 & 332.) The Court has reviewed the
 15 R&Rs (dkt. nos. 331 & 332), and Plaintiff's motions (dkt. no. 290 & 326) and objections
 16 (dkt. no. 335), and agrees with the Magistrate Judge.

17 It is therefore ordered that the Magistrate Judge's Reports and Recommendations
 18 (dkt. nos. 207, 255, 259, 262, 264, 312, 331 & 332) are accepted and adopted. Plaintiff's
 19 motions for injunctive relief and hearings (dkt. nos. 97, 98, 311, 231, 227, 237 256, 290
 20 & 326) are denied. Plaintiff's objections (dkt. nos. 214, 324, 268, 282 & 335) are
 21 overruled.

22 **VIII. Dkt. nos. 194 & 203: MOTIONS FOR MANDAMUS**

23 The Magistrate Judge recommends that the Court deny Plaintiff's two motions for
 24 mandamus. (Dkt. nos. 265 & 258.) In both R&Rs, the Magistrate Judge found that some
 25 allegations raised new claims that are not part of this lawsuit. The May 12, 2014, R&R

27 ⁷Plaintiff refers to his second motion as "Emergency Attempt on life by Def
 28 (Again!)." (Dkt. no. 326.) The Magistrate Judge properly construes this motion as a
 request for injunctive relief.

1 also found that Plaintiff's allegations relating to the denial of his request for copying raise
2 concerns that warrant further inquiry.⁸ (Dkt. no. 258 at 7.) In the same R&R, the
3 Magistrate Judge recommended denying Plaintiff's motion, but separately addressed
4 Plaintiff's claim that he was denied access to the grievance documentation he needed to
5 respond to Defendants' pending dispositive motion. (Dkt. no. 265 at 4-5.) In his
6 objections, Plaintiff indicates that he does not understand the Magistrate Judge's
7 decision or reasoning and believes the allegations are related to the claims in this case,
8 including claims that the Court has dismissed. (Dkt. no. 282.) The Court has reviewed
9 Plaintiff's motions (dkt. nos. 194 & 203), the R&Rs (dkt. nos. 265 & 258), and Plaintiff's
10 objection (dkt. no. 282), and agrees with the Magistrate Judge's recommendations. The
11 Court therefore accepts and adopts the R&Rs in full. Plaintiff's motions for mandamus
12 (dkt. nos. 194 & 203) are denied.

13 **IX. Dkt. Nos. 250, 342 & 365: MOTIONS FOR HEARING AND FOR DUE
14 PROCESS**

15 Plaintiff requests a status conference with the Court to address the motion for
16 reconsideration (dkt. no. 135) that the Court granted him leave to file and the countless
17 motions and objections he has filed in this case. (Dkt. nos. 250, 342 & 365.) Because
18 this Order addresses a majority of the pending motions that are fully briefed, Plaintiff's
19 motions (dkt. nos. 250, 342 & 365) are denied as moot.

20 **X. CONCLUSION**

21 This Order resolves nine (9) motions for injunctive relief. The Magistrate Judge
22 recently issued an R&R recommending denial of Plaintiff's remaining motion for
23 injunctive relief (dkt. no. 221). (Dkt. no. 370.) Thus, since the Court's hearing on
24 December 3, 2013, Plaintiff has filed a total of ten (10) motions seeking injunctive relief
25 on allegations that are not related to the claims or defendants in this case. Plaintiff is

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27 ⁸After inquiring into this issue, the Magistrate Judge issued a decision to which
28 Plaintiff objected. The Court will address Plaintiff's objection in another order.

1 reminded that any further failure to comply with the Court's Interim Case Management
2 Order (dkt no. 176) by filing requests for injunctive relief that are unrelated to the claims
3 and defendants in this case may subject him to sanctions, including dismissal of this
4 action pursuant to Federal Rule of Civil Procedure 41(b).

5 As this Court reminded Plaintiff during the December 3, 2013, hearing, both this
6 Court and the Magistrate Judge have an extensive case load. Plaintiff only creates
7 further delays by filing repeated motions for the same relief instead of waiting for a ruling
8 on his previously filed motion. Similarly, Plaintiff's practice of filing motions to assert
9 claims that are unrelated to the counts that survive screening will not result in the speedy
10 resolution of Plaintiff's case. Moreover, absent exceptional circumstances, the Court
11 reviews motions filed in chronological order and will schedule a hearing as the Court
12 deems necessary.

13 DATED THIS 17th day of September 2014.



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15 MIRANDA M. DU
16 UNITED STATES DISTRICT JUDGE
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